Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 11, 1993

Mr. David J. Freeman
Executive Secretary
Texas Racing Commission
P.O. Box 12080
Austin, Texas 78711-2080

Letter Opinion No. 93-20

Re: Whether the Texas Racing Commission has the authority to adopt rules requiring its licensees to provide workers' compensation insurance for the licensees' employees (RQ-499)

Dear Mr. Freeman:

You have requested an opinion from this office, construing V.T.C.S. article 179e, the Texas Racing Act ("the act"). You advise us that the Texas Racing Commission ("the commission") proposes the following rules:

> Sec. 309.64. Insurance.[1]
>
> (a) An association shall provide adequate liability insurance for the racetrack.
>
> (b) An association shall provide workers' compensation insurance covering all employees of the racetrack.
>
> Sec. 311.153. Workers' Compensation.
>
> (a) A trainer shall provide workers' compensation . . . insurance for each of the trainer's employees.
>
> (b) If a trainer contracts with an individual to **provide services regarding the care, riding, or exercising of a horse at a racetrack, such as a groom, pony person**, . . . jockey, or exercise rider, . . . the trainer **must** . . . provide workers' compensation . . . for the individual.[2]

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[1]For the purposes of this provision, an association is defined as "a person licensed under this Act to conduct a horse race meeting or a greyhound race meeting with pari-mutuel wagering." V.T.C.S., art. 179e § 1.03(2).

[2]We note that the commission has promulgated section 311.171 which states that kennel owners shall provide workers' compensation insurance for each of their employees. 16 TAC § 311.171.

Tex. Racing Comm'n, 17 Tex. Reg. 3682-83 (1992) (footnote added) (emphasis in original). You specifically ask that we address the commission's authority to require its licensees to subscribe to workers' compensation insurance, when other state law makes subscription to such insurance optional. *See* V.T.C.S. art. 8308-3.23. In our opinion, the commission's proposed requirements exceed the commission's authority under the applicable statutes and are therefore invalid. *See Kelley v. Industrial Accident Bd.*, 358 S.W.2d 874 (Tex. Civ. App.--Austin 1962, writ ref'd).

The act establishes the commission and authorizes it to "license and regulate all aspects of . . . horse racing in this state . . ." V.T.C.S. art. 179e, § 3.02(1)(a). The act further sets out comprehensive guidelines for that regulation. *See id.* §§ 6.06 (Racetrack licenses; grounds for denial, revocation, and suspension.); 7.01 (License required); 7.02 (Licensed activities); and 7.04 (Licenses; grounds for denial, revocation, and suspension). Section 3.02 provides the following:

> In accordance with Section 3.01 of this Act, the commission shall regulate and supervise every race meeting in this state involving wagering on the result of greyhound or horse racing. *All persons and things relating to the operation of those meetings are subject to regulation and supervision by the commission.* The commission shall adopt rules for conducting greyhound or horse racing in this state involving wagering and shall adopt other rules to administer this Act that are consistent with this Act. [Emphasis added.]

Additionally, section 3.02(1) of the act provides in pertinent part:

> (a) Any provision in this Act to the contrary notwithstanding, *the commission may license and regulate all aspects* of greyhound racing and horse racing in this state, whether or not that racing involves pari-mutuel wagering. [Emphasis added.]

The stated purpose for the commission's authority over race meetings is "[t]o preserve and protect the public health, welfare, and safety." V.T.C.S. art. 179e, § 6.06. You argue that the provisions of article 179e, taken together, suggest that the commission is authorized to promulgate the proposed rules pursuant to the broad scope of its discretionary authority. We find this argument unpersuasive.

The racing commission is an administrative agency. As such, it is a creature of statute and has no inherent authority. *Sexton v. Mount Olivet Cemetery Ass'n*, 720 S.W.2d 129, 137 (Tex. App.--Austin 1986, writ ref'd n.r.e.). An agency's rule-making authority may be expressly conferred upon it by statute, or implied from other powers and duties given or imposed by statute. *Dallas County Bail Bond Bd. v. Stein*, 771 S.W.2d 577, 580 (Tex. App.--Dallas 1989, writ denied). The rules and regulations adopted by administrative agencies may not impose additional burdens, conditions or restrictions in

excess of or inconsistent with statutory provisions. *Hollywood Calling v. Public Util. Comm'n*, 805 S.W.2d 618, 620 (Tex. App.--Austin 1991, no writ); *Bexar County Bail Bond Bd. v. Deckard*, 604 S.W.2d 214, 216 (Tex. App.--San Antonio, 1980, no writ); *see also* Attorney General Opinion JM-1147 (1990) (administrative rules must be reasonable). Furthermore, the exercise of rule-making authority is subject to judicial review. *Garner v. Lumberton Indep. Sch. Dist.*, 430 S.W.2d 418 (Tex Civ. App.--Austin 1968, no writ). The critical factor to consider in determining whether the commission has exceeded its rule-making authority is whether the proposed rules are in harmony with the general objectives of the statute. *State Bd. of Ins. v. Deffebach*, 631 S.W.2d 794, 798 (Tex. App.--Austin 1982, writ ref'd n.r.e.); *see Gerst v. Oak Cliff Sav. & Loan Ass'n*, 432 S.W.2d 702, 706 (Tex. 1968).

We are of the opinion that the rule-making authority delegated to the commission does not encompass the authority to require subscription to workers' compensation insurance because the workers' compensation statutes provide that subscription is discretionary. Article 8308-3.23, V.T.C.S., provides the following:

> (a) *Except for public employers* and as otherwise provided by law, an employer *may* elect to obtain workers' compensation insurance coverage. An employer *may* obtain coverage through a licensed insurance company or through self-insurance as provided by this Act. An employer who obtains coverage is subject to the provisions of this Act. . . . [Emphasis added.]

It is generally presumed that every word in a statute is used for a purpose. *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535 (Tex. 1981). Absent ambiguity, we must follow the clear language of the statute. *Republicbank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607 (Tex. 1985); *Simmons v. Arnim*, 220 S.W. 66, 70 (Tex. 1920). The operative word in article 8308-3.23 is the word "may." In construing statutes the use of "may" as opposed to "shall" is indicative of discretion or choice between two or more alternatives, but the context in which the word appears must be the controlling factor. BLACK'S LAW DICTIONARY 979 (6th ed. 1990). Thus, the legislature's use of the word "may" affords licensees with the discretion to subscribe to workers' compensation insurance.[3]

We conclude that article 8308-3.23 is the controlling statute. Article 179e, V.T.C.S., the Texas Racing Act, confers no authority on the Texas Racing Commission to promulgate rules requiring that its licensees subscribe to workers' compensation insurance, an act which is declared discretionary by statute.

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[3]Every employee retains common-law rights unless the employer becomes a subscriber to workers' compensation coverage, which is elective. Absent evidence that the employer is a subscriber, courts will not assume so. *Brown Services, Inc. v. Fairbrother*, 776 S.W.2d 772, 776 (Tex. App.--Corpus Christi 1989, writ denied).

SUMMARY

The Texas Racing Commission lacks the authority to require that its licensees provide workers' compensation insurance.

Yours very truly,

Toya C. Cook

Toya C. Cook
Assistant Attorney General
Opinion Committee